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No. 99-1647

Supreme Court, U.S.
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In The

Supreme Court of the United States

AMERICAN TARGET ADVERTISING, INC.,

Petitioner,

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICUS CURIAE OF NATIONAL FEDERATION OF NONPROFITS IN SUPPORT OF PETITIONER

ERROL COPILEVITZ*
WILLIAM E. RANEY
COPILEVITZ AND CANTER, LLC
423 W. Eighth Street
Suite 400
Kansas City, MO 64105
Telephone: (816) 472-9000
Facsimile: (816) 472-5000
*Counsel of Record
Counsel for Amicus Curiae
National Federation of Nonprofits

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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INTEREST OF AMICUS

[1]This brief is filed by amicus National Federation of Nonprofits. Information concerning the National Federation of Nonprofits is appended hereto.

STATEMENT OF THE CASE

The case presented to the Court involves the important issue of the extent to which states can regulate charitable organizations' appeals to the public. Amicus National Federation of Nonprofits asserts that the appellate court applied an incorrect standard of scrutiny to a Utah law which regulates fully-protected speech, i.e. educational speech and advocacy that includes an appeal for support conducted by Petitioner's charitable clients and other similarly-situated organizations. Because the law regulates fully-protected speech it is properly subject to strict scrutiny and should be struck down unless narrowly tailored to further a compelling government purpose by the least restrictive means.

The law of the State of Utah requires that a charitable organization as that term is defined under the state law[2] only hire licensed consultants to advise them concerning

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amicus states that no counsel other than counsel for the amicus authored this brief in whole or in part and no other person made a monetary contribution to the preparation of this brief.

[2] Utah Code Ann. § 13-22-2(1)(a).

how they raise money. This law applies despite the fact that the consultant may never set foot in Utah, the charity is already licensed and the charity is the author of any appeals which are delivered to Utah residents. The costs of this licensure are necessarily passed on to the charities which choose or are forced by economic necessity to hire consultants. Charities with consultants on staff or which can afford to produce the necessary material in-house do not have to absorb the additional costs and restrictions imposed by the Utah law. Therefore, identical charities delivering the same appeal by the same means are treated differently with no valid justification under the challenged law.

This law interferes with fully-protected activity under the First Amendment to the United States Constitution as well as the Commerce Clause to the United States Constitution. Because of its direct effect on fully-protected speech, the law should be subject to strict scrutiny, and should be struck down as a prior restraint of speech, as an overly burdensome regulation of speech and as an interference on interstate commerce.

More than 40 states regulate appeals for support by charitable organizations. Most states require charities to provide organizational documents, an audit and/or IRS Form 990, information about the organization's officers, directors and program service, as well as the contracts the organization may have with professional consultants. The information the Utah law requires professional fundraising consultants to file with the state in large part either duplicates the information which charities must already provide or is irrelevant. The consultant must also post a bond and pay a fee. Utah Code Ann. § 13-22-9. There is

no legitimate reason for the law's application to Petitioner, and for this reason the law is unconstitutional.

After the U.S. District Court dismissed the action, the 10th Circuit Court of Appeals affirmed in part and reversed in part. The opinion found that the Act was "content neutral" and subject to an intermediate level of scrutiny. Pet. App. 4a. The Court held that portions of the law vest licensure discretion in the Director of the Division of Consumer Protection and therefore constituted a prior restraint. *Id.* at 10a. The opinion rejected the argument that the law violated the Commerce Clause.

Petitioner then requested a writ of certiorari which this Brief urges the Court to grant.

SUMMARY OF ARGUMENT

The Petitioner provides advice to charities with regard to their efforts to educate and/or advocate to the public about their causes and appeal to the public for support of those causes. This activity is a form of speech, fully-protected by the First Amendment to the United States Constitution. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988); *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

Utah law requires licensure of consultants hired by charities to advise them on any form of appeal for public support. Utah Code Ann. § 13-22-9. This Court has held

three times that the involvement of a professional consultant in fundraising by a charity does not change the fully-protected nature of that activity – the fundraising aspect of any appeal is "inextricably intertwined" with the expressive nature of the contact, and, as such, charitable fundraising is protected at the core of the First Amendment. Limitations of this fully-protected expressive activity, therefore, are inherently suspect. *Riley*, 487 U.S. 781, 790.

The Utah statute is a content-based restriction on the appeal for public support. The law only applies if a Utah resident is asked to support the charity. A letter of advocacy which did not contain an appeal for support would not be regulated. The application of the law turns on whether the charitable communication contains an appeal for support. Yet, consultants to for-profit businesses mailing offers for goods or services into Utah are not required to register or post a bond, though it seems even more likely that such offers could potentially be fraudulent, prevention of which is the stated purpose of Utah's law, than charitable appeals.

Should the State of Utah legislate to require direct marketing consultants who advise sellers of goods or services to register as a precondition to a business sending mail offers to Utah residents, the legislation would not withstand constitutional review under either the commerce clause or commercial speech doctrines. *See, e.g., Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582 (1986). This Court has held that the First Amendment forbids application of a more restrictive regime to nonprofits' speech than applicable to commercial speech. *Metromedia, Inc. v. San Diego*, 453 U.S.

490, 513 (1981). The challenged law clearly violates this standard.

Utah's law also creates a prior restraint of protected speech by prohibiting some charities from delivering their messages to residents of the state and by creating an economic barrier to some organizations' solicitations even though their messages may be identical to those of other, unregulated charities.

Because Utah's law is a content-based restriction on fully-protected speech and a prior restraint, it is subject to strict scrutiny. The Tenth Circuit Court of Appeals erred in applying an intermediate level of scrutiny to this statute which regulates activity protected at the highest level by the First Amendment.

ARGUMENT

I. THE APPEAL FOR SUPPORT OF THE PUBLIC BY NONPROFIT ORGANIZATIONS IS FULLY-PROTECTED BY THE FIRST AMENDMENT.

In the decade of the 1980's, this Court ruled three times that the appeal for support by a charity was entitled to plenary protection by the First Amendment. Most recently, this Court held that the solicitation of charitable contributions is protected speech and that the involvement of a paid professional in the production and delivery of that speech did not alter in any way its fully-protected nature. *Riley*, 487 U.S. at 789 and 795-6. *See also Schaumburg*, 444 U.S. at 632 and *Munson*, 467 U.S. at 967.

In *Schaumburg* the Supreme Court held that:

> . . . charitable appeals for funds . . . involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment.

444 U.S. at 632.

The appeal for financial support cannot be successful unless linked to education and advocacy, i.e., the cause. In *Riley* and its predecessors, this Court refused to separate one function from the other. *Riley* also recognized that speakers delivering identical messages should not be subject to different restrictions on their speech based solely on the use of outside professionals versus employees. The speech is the same, and one appeal is no more likely than the other to be fraudulent. 487 U.S. at 791. For this reason, fundraising is equally important, and "inextricably intertwined" with more traditionally expressive activities.

Thus the Utah law cannot be considered to be merely an economic licensure law, for the finances it regulates directly affect speech. In *Riley* this Court held that:

> Whether one views this as a restriction of the charities' ability to speak, or a restriction of the professional fundraisers' ability to speak, the restriction is undoubtedly one on speech, and cannot be countenanced here.

[citations omitted]. *Id.* at 794. The law Petitioner urges this Court to review must be considered as a restriction on fully-protected speech.

II. THE UTAH LAW IS A CONTENT-BASED REGULATION OF SPEECH AS WELL AS A PRIOR RESTRAINT AND IS THEREFORE SUBJECT TO STRICT SCRUTINY.

A. THE UTAH LAW IMPOSES A CONTENT-BASED RESTRICTION ON SPEECH

By its terms, the Utah law affects only some charitable organizations, and it only affects some types of protected speech.

The Utah law defines "Professional fund raising counsel or consultant" as

> . . . a person who:
>
> (i) for compensation plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization, whether or not at any time the person has custody of contributions from a solicitation;
>
> (ii) does not solicit contributions; and
>
> (iii) does not employ, procure, or engage any compensated person to solicit or receive contributions.
>
> (b) "Professional fund raising counsel or consultant" does not include an attorney, investment counselor, or banker who in the conduct of that person's profession advises a client when actually engaged in the giving of legal, investment, or financial advice.

Utah Code Ann. § 13-22-2(11). Section 13-22-9 states that

> It is unlawful for any person or entity to act as a professional fundraiser or professional fund raising counsel or consultant, whether or not representing an organization exempt from registration under Section 13-22-8, without first obtaining a permit from the division . . .

The Utah law is a content-based restriction on free speech for three reasons. First, it is content-based because it applies its restrictions only if the mail piece sent by a charity contains an appeal for public support. Charitable organizations which can afford to spread their message without appealing for public support may hire any professional advisors they choose. Second, Utah does not require advisors for commercial mailers to register and post bond if they advise for-profit businesses about their mail solicitations. Third, this provision of the Utah law affects only charities which hire professional advisors and, therefore, disproportionately affects smaller or less popular charities which may not have the resources to hire expert employees to produce the necessary materials in-house.

In *Riley, supra*, the Court examined a North Carolina statute which applied a disclosure, or a form of forced speech, requirements to charitable solicitations which were delivered through outside professionals but did not apply restrictions to solicitations delivered through volunteers or a charity's own employees. 487 U.S. at 795. The Court found that this restriction was content-based and therefore subject to strict scrutiny. *Id.* The Court held that restrictions on charitable solicitations which apply only

to charities which use professionals to aid in their appeals:

> necessarily discriminates against small or unpopular charities which must usually rely on professional fundraisers. Campaigns with high costs and expenses carried out by professional fundraisers must make unfavorable disclosures, with the predictable result that such solicitations will prove unsuccessful. Yet the identical solicitation with its high costs and expenses, if carried out by the employees of a charity or volunteers, results in no compelled disclosure, and therefore greater success.

Id. at 799.

The effect of the Utah law is identical: small or unpopular charities which are forced by economic necessities to use professionals to aid in their appeal must hire licensed professionals, only, and therefore pay higher fees than charities which can afford to produce the same solicitations in-house. The challenged provision, therefore, acts as a barrier to some smaller charities that cannot afford the additional cost. When any organization's protected speech is diminished, society as a whole is the loser.

B. THE UTAH LAW IMPOSES A PRIOR RESTRAINT ON PROTECTED SPEECH

The Utah law also prohibits certain organizations from speaking at all by prohibiting them from mailing solicitations into the state if their professional advisor is not registered. The bond and fee requirements of the law, further, establish an economic barrier to entry for this

class of speech. The law creates a prior restraint of speech through both of these mechanisms.

A consultant on notice that 40 states regulate charitable appeals will undoubtedly decide, in some cases, not to advise certain charities because to do so will expose the consultant to dozens of registrations, bonds and fees or risk criminal prosecution, e.g., Utah Code Ann. § 13-22-4(1). The *Riley* Court considered a law of similar application and noted:

> this chill and uncertainty might well drive professional fundraisers out of North Carolina, or at least encourage them to cease engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones), all of which will ultimately "reduc[e] the quantity of expression." *Buckley v. Valeo*, 424 U.S. 1, 19, 39 (1976).

Riley, 487 U.S. at 794. The lesson to be learned from *Riley* is that when certain consultants decide not to advise charities because of this overarching law, the small or unpopular charity as well as the public in general is the loser.

It is a fundamental tenet of First Amendment jurisprudence that prior restraints of protected speech are abhorrent to the Constitution and that they would be struck down in all cases but the most extreme, e.g., times of war or "fighting" words. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). This Court has also noted that: "any system of prior restraints of expression comes to this

court bearing a heavy presumption against its constitutional validity." *Freedman v. State of Maryland*, 380 U.S. 51, 57 (1965) *quoting Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225 (1989).

Subsequent to *Near* and *Freedman*, the Supreme Court ruled that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment Rights." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976). Prior restraint of speech is allowed only if certain procedural safeguards are met. *Freedman*, 380 U.S. at 58. First, the burden of proving that future speech is unprotected lies on the censor. Second, the State cannot make a final decision regarding whether the speech may be silenced without a judicial determination in an adversarial proceeding that the speech is unprotected. *Id. See also Riley*, 487 U.S. at 802.

It is well settled that the government may not prospectively silence speech except in extremely limited circumstances. *Near*, 283 U.S. at 716. It is further a settled rule of constitutional jurisprudence that government may not do indirectly what it is forbidden from doing directly:

> [a]s we have often noted, " '[c]onstitutional rights would be of little value if they could be . . . indirectly denied.' " *Harman v. Forssenius*, 380 U.S. 528, 540 (1965), *quoting Smith v. Allwright*, 321 U.S. 649, 664 (1944). The Constitution "nullifies sophisticated as well as simple-minded modes" of infringing on Constitutional protections. *Lane v. Wilson*, 307 U.S. 268, 275 (1939); *Harman v. Forssenius*, 380 U.S. at 540-541.

U.S. Term Limits v. Thornton, 115 S. Ct. 1842, 1867 (1995). Thus a statute could create a prior restraint by forbidding

speech directly or by creating a barrier to that speech such that some speakers are silenced.

The speech of a charity using a non-licensed consultant is no less fully-protected than any other organization. Because this system of prior restraint lacks this and other essential safeguards, it is unconstitutional.

C. THE UTAH LAW IS ONLY CONSTITUTIONAL IF IT CAN WITHSTAND STRICT SCRUTINY.

To withstand strict scrutiny, a statute must be narrowly tailored to further a defined, compelling interest which the state is entitled to protect. *Munson*, 467 U.S. at 959-60; *Schaumburg*, 444 U.S. at 636. Meeting this standard is a burden borne by the state. *See, e.g., Riley*, 487 U.S. at 789; *Munson*, 467 U.S. at 960-1; *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989). This Court also stated that the government has the ability to regulate the content of protected speech to further a compelling interest only if "it chooses the least restrictive means to further the articulated interest." *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). The statute at issue fails this test.

The Utah law cannot meet this level of scrutiny because it is redundant and unrelated to any legitimate government purpose. The exceptions to the law, furthermore, weigh against any legitimate purpose the Respondent may claim for the law. *See Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173, 178 (1999) (In that case, this Court struck down a statute "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."). As set forth in

this Brief, the Utah law exempts several types of advisors from its registration requirements and exempts several types of speech, which may be more likely to be fraudulent.

The Utah law allows mail from commercial entities to be delivered with no equivalent licensure scheme. It also allows mail from charities who do not hire advisors. There is no more likelihood that Petitioner's mail would be fraudulent than these types of mail, and therefore the causal relationship between the Utah law and Respondent's asserted purpose fails.

III. THE APPELLATE COURT ERRED BY APPLYING AN INTERMEDIATE LEVEL OF SCRUTINY TO THE UTAH LAW.

The Tenth Circuit Court of Appeals ruled that the Utah law was content neutral and was therefore subject to an intermediate level of scrutiny. *American Target Advertising v. Francine Giani,* 2000 U.S. App. Lexis 429, 5 (10th Cir. 2000).

Application of this standard is a question of law, and as such is reviewed by this Court de novo. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 498-511 (1984). Given the fully-protected nature of charities' speech and the fact that this case is a facial challenge to the Utah law, this Court need not defer to the opinion of the appellate court and should consider the question de novo.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit Court of Appeals should be reversed in part and affirmed in part.

Respectfully submitted,

COPILEVITZ & CANTER, P.C.

ERROL COPILEVITZ
WILLIAM E. RANEY
423 West 8th Street, Suite 400
Kansas City, Missouri 64105
(816) 472-9000
(816) 472-5000 (Facsimile)

APPENDIX

The National Federation of Nonprofits, Inc., is a trade group based in Washington, D.C. Since 1982 the National Federation of Nonprofits has been an aggressive and effective advocate for nonprofits in postal, regulatory, legislative, and accountability issues.